

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.

FILED

SEP 14 1956

JOHN T. FEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1956

No. **422**

OFFICE EMPLOYES INTERNATIONAL UNION,
Local No. 11, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT**

JOSEPH E. FINLEY.
215 DeSales Building
Washington, D. C.
Attorney for Petitioner

LIPPMAN, WOODS, TYLER AND FINLEY
215 DeSales Building
Washington, D. C.
Of Counsel.

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
The Statute Involved	2
Statement of the Case	2
Reasons for Granting the Writ	8
I. Double Standard Labor Law: Are Labor Union Employers Free to Commit Unfair Labor Prac- tices When Business Employers Must Obey the Law	8
II. Agency Above Congress: The NLRB Flouted the Express Will of Congress in Excluding Unions as Employers From Coverage of the Law	13
III. Conflict Among the Decision Makers: There Is No Majority Reasoning to Support This Para- doxical and Unwarranted Result	20
Conclusion	21

TABLE OF CASES

Air Line Pilots Association, 97 NLRB 929	5, 20
Bausch & Lomb Optical Co., 108 NLRB 1555	7
Lutheran Church, Missouri Synod, 109 NLRB 659 ...	19
Optical Workers Union v. NLRB, 229 F.2d 170, 24 LW 3328	3
Pederson v. NLRB, — F.2d —, 38 LRRM 2227	13
Trustees of Columbia University, 97 NLRB 424	19
United States v. Fisher, 3 Cranch 358, 386	14
United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221	14

STATUTES

National Labor Relations Act, as amended, Sec. 2(2)	2, 3, 7, 8, 13, 14
National Labor Relations Act, as amended, Sec. 3(d) . . .	12
National Labor Relations Act, as amended, Sec. 8(a)	
(1), (2), (3), (4), (5)	4

IN THE
Supreme Court of the United States

OCTOBER TERM, 1956

—
No.
—

OFFICE EMPLOYES INTERNATIONAL UNION,
LOCAL No. 11, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

—
**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT**

—
OPINIONS BELOW

The opinion of the National Labor Relations Board is reported at 113 NLRB No. 111 (J.A. 1786). The opinion of the Court of Appeals for the District of Columbia Circuit is reported at F. 2d , and is set out in Appendix A, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1956 (Appendix A, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the refusal of the National Labor Relations Board to assert jurisdiction over unfair labor practices of Teamsters Unions as employers against their own employees was contrary to the expressed will of Congress and thus arbitrary and capricious?

2. Whether the National Labor Relations Board acted arbitrarily and capriciously in placing labor unions as employers in a category with religious, educational, and scientific organizations for jurisdictional purposes?

THE STATUTE INVOLVED

The single statutory provision about which this controversy revolves is Sec. 2 (2) of the National Labor Relations Act, as amended, 29 U. S. C. Sec. 152 (2), set forth in full as follows:

“(2) The term ‘employer’ includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal reserve bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.”

STATEMENT OF THE CASE

The primary issue is whether labor unions are free to commit unfair labor practices against the employees who work for them because the National Labor Rela-

tions Board has declined to exercise its jurisdiction over these labor union employers. The labor union employers involved are the International Brotherhood of Teamsters and several of its affiliates, comprising one of America's largest and most powerful labor unions. The petitioner is a local union of the Office Employees International Union, a member of the American Federation of Labor-Congress of Industrial Organizations just as are the Teamsters. The Office Employees union was the collective bargaining agent for the employees who worked for the Teamsters unions. This is not merely another case seeking Supreme Court review of the limits of discretion allowable to the National Labor Relations Board in establishing its jurisdiction over labor relations cases.¹ This case involves a specific statutory reference to labor unions as employers and a policy established by Congress through the language of the statute and its legislative history.

Despite the language of Sec. 2 (2) of the National Labor Relations Act, as amended,² which includes labor organizations within the definition of employer "when acting as an employer", the NLRB held that it would not effectuate the policies of the Act to assert jurisdiction over unfair labor practices of unions when acting as employers. The comments of dissenting National Labor Relations Board Members Rodgers and Leedom eloquently illustrate the importance of the primary issue:³

¹ Cf. *Optical Workers Union v. NLRB*, 229 F. 2d 170 (CA 5, 1955), certiorari denied, — U.S. —, 24 L. W. 3328 (Oct. Term, 1955).

² 29 U. S. C. Sec. 152 (2).

³ Joint Appendix 1795, hereinafter referred to as J. A.

"We believe such decision achieves a paradoxical and unwarranted result in permitting labor unions to deny to their own employees the very rights and privileges which unions have so vigorously advocated and won for employees of others. Labor unions are now free to flout the very statutory provisions which they ardently championed, and which have been hailed as the Magna Charta of labor."

Events culminating in this case began in 1953, when several Teamsters Unions and affiliates in Portland, Oregon, undertook a course of treatment of their own office and clerical employees that caused unfair labor practice charges to be filed by Petitioner with the National Labor Relations Board against these labor unions as employers. Complaints were thereafter issued, and extensive hearings were held before a Trial Examiner.

The Teamsters Unions were found guilty by the Examiner of violations of every employer unfair labor practice section in the law.⁴ The scope of these violations is again best illustrated by the description of dissenting NLRB Members Rodgers and Leedom, who said:⁵

"These violations found by the Trial Examiner were not mere technical or trivial infringements upon the rights of the employees involved, but

⁴ Employer unfair labor practices in the National Labor Relations Act, 29 U. S. C. Sec. 151 et seq., are contained in Sec. 8 (a), subsections (1), (2), (3), (4), and (5). The Teamster respondents were found by the Trial Examiner to have violated every one of these subsections, entailing all the employer unfair labor practices possible.

⁵ J. A. 1796.

were, if the Trial Examiner is correct, part and parcel of a purge of all employees of the Respondents who persisted in promoting the cause of the Charging Union as against Local 223, the organization favored by the other Respondents; and, if we accept the Trial Examiner's findings, certain of the Respondents by their conduct showed not only a disregard for the guarantees of the Act but also the Board's judicial processes by discharging employees because they had been subpoenaed by the General Counsel to testify against 2 of the Respondents and, in the case of Respondent Sweeney, by urging a prospective witness for the General Counsel either to falsify her testimony or 'take a trip.'"

Not only did these Teamsters unions urge witnesses to falsify testimony or "take a trip," but, according to Members Rodgers and Leedom,* were found to have committed one unfair labor practice never before encountered by the Board in its 20-year history of dealing with unfair treatment of employees. These respondent unions, in dealing with their own workers, took reprisals against employees who had been subpoenaed as Board witnesses even before these employees had testified.

Concerning jurisdiction over these unions as employers, the Trial Examiner was confronted with the only previous NLRB decision on this question, *Air Line Pilots Association*, 97 NLRB 929. There, in a representation proceeding, the Board had found that Congress intended that labor unions be treated like any other employer with regard to their own employees, that the union employer involved was multi-state in

* J. A. 1797.

character, and that jurisdiction would therefore be asserted. Following this precedent, the Examiner found the Teamsters unions well within the meaning of the term "multi-state enterprise", and held that jurisdiction should be taken over these union employers.⁷

Exceptions to the Trial Examiner's Intermediate Report were filed with the NLRB, oral argument was heard limited to the question of the exercise of the Board's jurisdiction, and on August 25, 1955, the Board handed down its decision, refusing to assert jurisdiction over these unions as employers.⁸ Accordingly, the complaints were dismissed.

Chairman Farmer and Member Peterson, writing the opinion of the Board, said the statutory inclusion of unions as employers when acting as employers left the Board free to determine if their activities affected commerce, and if so, whether Board jurisdiction over their operations would effectuate the policies of the Act.⁹ The Teamsters unions, said the Board majority, were nonprofit organizations. The Board did not assert jurisdiction over nonprofit organizations except "in connection with purely commercial activities of such organizations."¹⁰ Therefore, the Board would not take

⁷ J. A. 1665. The Examiner found that the International Brotherhood of Teamsters was a national labor organization with 872 chartered local unions and 1,204,477 members, and in the year ending December 31, 1953, had a total revenue of \$6,587,327, of which \$5,755,232 represented remittances to its offices in Washington, D. C. He further found that the International and its constituent locals constituted one integrated, closely-knit national organization.

⁸ J. A. 1790.

⁹ J. A. 1790.

jurisdiction over these unfair labor practices of union employers.¹⁰

Member Abe Murdock, in a concurring opinion, said that the legislative history of Sec. 2 (2) of the Act indicated to him that Congress did not intend that the Board should take jurisdiction over union employers except when unions engaged in commercial business.¹¹ Needless to say, Member Murdock's concurring opinion was apparently so ill-considered by the Board's General Counsel that no reliance was placed upon it in argument before the Court of Appeals, and no consideration of it was given by the Court below.

Members Rodgers and Leedom dissented from the Board's finding, stating that the statutory language and the comprehensive legislative history accompanying Sec. 2 (2) indicated a purpose of Congress to afford protection to employees of labor unions. Therefore, it was wrongful for the Board to ignore that purpose and permit union employers to escape the responsibilities which the law had imposed upon them.

The Court of Appeals, in a 2-to-1 decision, upheld the Board. Judge Prettyman, in an opinion joined in by Judge Danaher, held that the Board's placing

¹⁰ There was a strong hint in the Board's ruling that it would therefore take jurisdiction over unions as employers when they engaged in commercial businesses, citing *Bausch & Lomb Optical Co.*, 108 NLRB 1555, as such an instance. But in that case, the union itself did not engage in business, nor does a union hardly ever, if ever. There a corporation whose stockholders were mostly union members engaged in an optical business competing with an optical company which apparently employed these same stockholder-union members.

¹¹ J. A. 1792. As Petitioner's argument will point out, the legislative history is almost directly contrary to the strange finding of Member Murdock.

the respondent unions in a jurisdictional category with other nonprofit employers was rational and not arbitrary. As for the Sec. 2 (2) argument, the majority concluded that the statutory provision "put labor organizations in the category of employers as to their own employees, but it did no more than that." (Appendix A, p. 4a).

Judge Bazelon dissented. "I think Sec. 2 (2)'s strikingly particular reference to labor unions sharply differentiates them from non-profit organizations generally and subjects them to the jurisdiction of the Act in respect to their own employees." (Appendix A, p. 5a).

This petition is filed seeking review of the erroneous decision of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. Double Standard Labor Law: Are Labor Union Employers Free to Commit Unfair Labor Practices When Business Employers Must Obey the Law?

Fairness and justice in administration of our labor laws make this case particularly appropriate for Supreme Court review. The National Labor Relations Board has ruled that, even though Sec. 2 (2) of the Act covers labor unions as employers when they deal with their own employees, it will not take jurisdiction over unions as employers, and accordingly, any labor union employer is free to fire, discriminate against, or interfere with employees for any reason whatever. Commerical employers, however, are held to a standard of fair treatment of their employees, under requirements of the law. The Court of Appeals has declined to disturb this Board ruling as within an allowable area of administrative discretion.

This "paradoxical and unwarranted result"¹² makes this case one of great public concern. It is indeed difficult to rationalize a result where labor unions, even though specifically referred to in a statute as being within the law when they act as employers, are left free to commit unfair labor practices against their own employees. An American public, brought up on traditions of fair play and equal treatment for all, has the right to place this case in the forefront of matters of public importance.

It is respectfully submitted that no administrative decision of our time has been as widely reported in the American press as was the National Labor Relations Board decision of August 25, 1955.¹³ According to clippings furnished Petitioner by a newspaper clipping service, Press Intelligence, Inc., of Washington, D. C., some one hundred and four (104) American daily newspapers reported the NLRB decision in their editions. At least twenty (20) of these newspapers considered the ruling of such fundamental importance that they reported it on their front page.¹⁴

¹² Dissenting NLRB opinion of Members Rodgers and Leedom, J. A. 1795.

¹³ Petitioner, of course, has no figures to substantiate such a belief, but considers the nationwide press coverage so extensive that it would be unusual, indeed, if any other ruling of an administrative agency could have been as widely covered.

¹⁴ These leading newspapers considered the importance of this decision as worthy of front page coverage:

New York Times, Baltimore Sun, Boston Herald, Cleveland Plain Dealer, Louisville Courier-Journal, Portland (Me.) Press-Herald Telegram, Phoenix (Ariz.) Republic, Knoxville Journal, Portland (Ore.) Oregonian, Des Moines Register, Baltimore Evening Sun, Madison (Wis.) State Journal, Beaumont (Tex.) Enterprise, Augusta (Ga.) Chronicle, St. Joseph (Mo.) Gazette, Fort Wayne

Editorial comment, another indicia of the importance of a news event, was widespread. Clippings in Petitioner's file, which are not submitted to be exhaustive, reveal that at least 34 newspapers carried editorials on the NLRB ruling. Not one single editorial is found which approves the NLRB decision.¹⁵

Representative editorials illustrate the public reaction that was aroused by the NLRB ruling. The Salt Lake City Deseret News and Telegram of Aug. 30, 1955, titled its editorial, "Double Standard Labor Relations." The Milwaukee Journal of Aug. 30, 1955, headlined its comment, "A Fantastic Labor Decision." The Youngstown (O.) Vindicator of Aug. 31, 1955, said, "A Mistaken Ruling." The New York Times of Aug. 31, 1955, in a careful and analytical editorial headed, "When Unions Are Unionized," was extremely critical of the Board decision.

Not only does the American public rightfully consider the issue here one of fundamental public importance, but the thousands of people who earn their living working for labor unions ought to be afforded the protection of the labor statute.

The Board might argue, in response to this petition, that the issue here is of little public importance because this is the first case to come before the NLRB for decision involving unfair labor practice charges against

(Ind.) Journal Gazette, Paterson (N. J.) News, Lynchburg (Va.) News, Charlotte (N. C.) Observer, and Wichita (Kan.) Eagle, all in editions of August 29, 1955.

¹⁵ Petitioner would be the last to argue that editorial opinion is properly indicative of the correctness of a legal ruling, but presents these newspaper views merely to show the grave national concern over the NLRB decision.

a labor union as an employer.¹⁶ But such an argument ignores the restraining influence that Sec. 2 (2) must have exercised over the years. Most labor unions, engaged in the primary activity of protecting and fighting for employee rights, would not care to have the unwholesome publicity that would pursue their unfair dealings with their own employees. Thus, it was not until the mammoth Teamsters Union, notoriously disdainful of public opinion, ruthlessly interfered with rights of its employees that any union was willing to take a stand for its "right" to deal unfairly with its own workers. Now that the NLRB rejection of jurisdiction has been approved by the Court of Appeals, other unions are free to quietly "handle" their employees as self-interest dictates.

But in view of the critical question of whether our law provides for equal treatment for both business employers and labor union employers, and in view of the impressive public interest shown by the press reports of the NLRB ruling, can the Board seriously argue this case is lacking in sufficient public importance to justify this Court's review?

There is another factor in this case that makes it particularly appropriate for Supreme Court review now. If this decision is allowed to stand, there won't

¹⁶ As dissenting members Rodgers and Leedom pointed out (J. A. 1797, fn. 12), a partial search of the Board's files since 1947 showed that charges had been filed against unions as employers in 28 cases prior to this one. In 15 of these cases, unions were charged with acts of discrimination against their employees, and 13 others charged them with refusing to bargain with their employees. These cases were disposed of in one administrative manner or another, but the statement of Members Rodgers and Leedom indicates that in each instance, the processes of the Board were called into play, thus assuming that the Board would exercise its jurisdiction in each and every instance.

be any more unfair labor practice cases brought against unions as employers. Consequently, there will be no further court tests of the validity of the Board's refusal to take jurisdiction. Under the National Labor Relations Act, complaints in unfair labor practice cases are issued only by the General Counsel.¹⁷ If this ruling stands as the Board's position, the General Counsel will have no cause to issue complaints in the future, even if charges are filed. And it is doubtful that any parties, aware of Board "law" as they are, would be willing to go through the futile motions of even filing charges. This one case could be the total life of this issue, in contrast to other great public issues which may arise with frequency in all sections of the country, before courts of the various states and throughout the federal districts.¹⁸ This Court is the court of last resort in the most literal sense.

With the searching question of the fairness of our labor laws before us, with a result standing now "paradoxical and unwarranted," with the chronicles of public opinion, the newspapers, voicing uniform concern over the present outcome, the decision that labor unions do not have to obey the law toward their own employees ought not to stand without final review by the Supreme Court of the United States. The importance of this issue warrants granting this petition.

¹⁷ Sec. 3 (d), National Labor Relations Act, as amended, 29 U. S. C. Sec. 153 (d).

¹⁸ If it be argued that Congress can readily correct the NLRB result by amending the statute, it should be pointed out that Congress ought not be required to sit as a post-decision appellate court whenever the NLRB obtains court approval for an erroneous ruling. Congress has properly provided for judicial review of administrative decisions to correct such gross errors as are presented here.

II. Agency Above Congress: The NLRB Flouted the Express Will of Congress in Excluding Unions as Employers From Coverage of the Law

The critical legal question pervading this case is whether the administrative agency used its discretion to override a statutory policy established by Congress. When an agency ignores the Congressional will, there should be little doubt that such action is unlawful. The Court of Appeals for the Second Circuit recently took that position in *Pederson v. NLRB*, F. 2d , 38 LRRM 2227, in finding the Board had abused its discretion in rejecting jurisdiction of a case. "Where the Board acts arbitrarily or capriciously or *where its action conflicts with a clear purpose of the statute*, it has exceeded its authority," said the Court (emphasis added).

The "clear purpose" of Sec. 2 (2), based upon the language of the provision, and the legislative history that accompanied it, was that when labor unions acted as employers, they should be liable for unfair labor practices like any other employer. The Board has used its "discretion" to rule that when labor unions act as employers, they are not to be held liable for unfair labor practices like any other employer. The Court of Appeals has approved that holding.

The Court of Appeals majority was in error when it failed to find that Congress wanted labor unions as employers held liable for their unfair labor practices. Referring to Sec. 2 (2), the majority said: "It put labor organizations in the category of employers as to their own employees, but it did not more than that." To paraphrase the Court of Appeals majority, Congress merely said that when labor unions act as employers, we shall define them in the Act as employers.

Then, the Board is free to determine whether it wishes to take jurisdiction over them or not in its wisdom of discretion. This was precisely the position of the NLRB majority which argued that all Sec. 2 (2) meant was that unions were placed in the category of employers as to their own employees, and thereafter, the Board was free to exercise its own broad discretion as to what it would do about asserting its jurisdiction.¹⁹

The Court of Appeals closed its eyes to the legislative history of Sec. 2 (2). A penetrating and analytical judiciary, following the wise words of Chief Justice John Marshall, "Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived . . ." ²⁰ needs only to evaluate the totality of Congressional conduct on this statutory section to realize that the legislature unquestionably intended that labor unions as employers should be held liable for their unfair labor practices. A short summary of the Congressional action so demonstrates:

1. The first national labor bill, S. 2926, introduced by Sen. Wagner in the 73rd Congress in 1934, excluded labor unions specifically from the definition of employer.²¹

2. Hearings were held on S. 2926 before the Senate Committee on Education and Labor, and witnesses

¹⁹ J. A. 1790.

²⁰ *United States v. Fisher*, 2 Cranch 358, 386, cited approvingly by this Court in *United States v. Universal C.I.T. Credit Corporation* 344 U. S. 218, 221.

²¹ NLRB Compilation of Legislative History of NLRA, 1935, p. 2.

forcefully criticized the exclusion of unions from the definition of employer.²²

3. When S. 2926 was favorably reported out of Committee, the section in issue had been changed to the same language that is in the law today, including unions within the definition of employer "when acting as an employer."²³ This was undoubtedly in response to the criticism of witnesses during hearings.

4. Accompanying S. 2926 was Senate Report No. 1184, 73rd Cong., 2nd Sess., May 26, 1934, which said:²⁴

"The reason for stating that 'employer' excludes 'any labor organization, other than when acting as an employer' is this: In one sense every labor organization is an employer, it hires clerks, secretaries and the like. In its relations with its own employees, a labor organization ought to be treated as an employer, and the bill so provides.

²² "There is no reason why a labor organization or anyone acting in the capacity of an officer or agent of such labor organization who hires employees should not be termed and considered an employer. No reason exists why labor organizations should be exempt from the provisions of this Act." Remarks of L. L. Balleisen, secretary, Industrial Division, Brooklyn Chamber of Commerce, Board Compilation, p. 690.

"This exclusion of labor organizations as employers is unfair per se if the philosophy of the bill itself is consistent with justice. It is, no doubt, based upon the erroneous assumption that anyone working for a labor organization is perforce guaranteed the same treatment as is provided for in the bill. . . ." Remarks of Leslie Vickers, economist, American Transit Association, Board Compilation, p. 720. Mr. Vickers was rightfully foreseeing the kind of conduct which the Teamster respondents below engaged in twenty years later.

²³ NLRB Compilation of Legislative History of NLRA, 1935, p. 1085.

²⁴ NLRB Compilation, p. 1102.

But in relation to other employees it ought not to be treated as an employer, and ought to have the right to use lawful means to induce employees to join the organization."

Thus, after criticism in hearings that unions as employers should not be exempt from the bill, the Committee said that a "labor organization ought to be treated as an employer, and the bill so provides." This must mean that Congress desired that labor unions when acting as employers be liable for their unfair labor practices like any other employer.

5. After the 73rd Congress failed to act on the labor bill, Sen. Wagner introduced S. 1958 in the First Session of the 74th Congress. This bill was enacted into law as the National Labor Relations Act, popularly known as the Wagner Act, and again, the employer definition section excluded labor organizations altogether.²⁵

6. In hearings before the Committee, criticism was again aimed at the exclusion of labor unions from the definition of employer.²⁶

7. When S. 1958 was reported favorably out of Committee, the material portion of Sec. 2 (2) was again changed to read precisely as it does today.²⁷

²⁵ NLRB Compilation, p. 1295.

²⁶ Robert C. Graham, vice president of Graham-Paige Motors Corp., in listing criticisms of the bill, enumerated this one as follows: "This bill, in paragraph (2) of Section 2, excludes 'any labor organization from any of the requirements to which employers are subjected by this bill'." Board Compilation, p. 1990.

²⁷ NLRB Compilation, p. 2286.

8. Accompanying S. 1958 was Senate Report No. 573, 74th Cong., 1st Sess., explaining why unions were excluded, except when acting as employers.²⁸ This explanation was similar in tone and content to that made by the predecessor committee.

The author of the labor Act intended to exclude unions as employers from provisions of the law. This would have produced the result which the National Labor Relations Board has given us twenty years later in its "discretion." Criticism of that result in committee was made by witnesses who argued that unions when acting as employers should be held to the provisions of the law. Successive Committees amended the bill to change the intent of the sponsor and bring unions when acting as employers within the statute's provisions. By bringing unions when acting as employers within the provisions of the Act after the author of the bill had omitted them, and particularly after witnesses had criticized the author's exclusion for the same equitable reasons that persist today, Congress demonstrated a clear purpose that it wanted labor unions when acting as employers held liable for their unfair labor practices.

It was an abuse of the Board's discretionary jurisdiction to reject the Congressional purpose and substitute its judgment on what would effectuate the policies of the Act. It was error for the Court of Appeals

²⁸ NLRB Compilation, p. 2305. The Report stated:

"The term 'employer' excludes labor organizations, their officers and agents (except in the extreme case when they are acting as employers in relation to their own employees). Otherwise the provisions of the bill which prevent employers from participating in the organizational activities of workers would extend to labor unions as well, and thus would deprive unions of one of their normal functions."

to find that Congress did no more than include unions within the definition of employer and leave the NLRB free to decide in its discretion whether it desired to exercise jurisdiction over these union employers. The Court of Appeals wrongfully allowed the NLRB to use its "discretion" to amend the statute back to the original language of Sen. Wagner after Congress had methodically demonstrated it did not desire that result.

The second error of the Court of Appeals was in its finding that the Board's placing of unions in a jurisdictional category with "non-profit" employers was not arbitrary.²⁹ When Congress undertook to amend the labor statute in 1947, the House bill, H. R. 3020, in defining employer, had language that excluded "any corporation, community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual."³⁰ The Senate removed this broad exclusion, and the Conference Report stated:

"... The other nonprofit organizations excluded under the House bill are not specifically excluded in the conference agreement, for only in exceptional circumstances and in connection with purely commercial activities of such organizations have any of the activities of such organizations or of their employees been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act."

²⁹ This error comes into issue only if the Court of Appeals was correct in holding that Sec. 2(2) allows the Board to exercise its discretion to determine whether or not it will take jurisdiction over unions as employers.

³⁰ J. A. 1799-1800.

Thus, Congress was approving the Board's policy of not taking jurisdiction over religious, charitable, scientific, literary or educational organizations, not "nonprofit" groups as a whole. Labor unions, who operate for the intensely practical purpose of bringing economic betterment to their members, are neither religious nor charitable nor scientific nor literary nor educational organizations. To place them into such a jurisdictional category is arbitrary conduct, especially when the Board itself, in the same opinion contested here, referred to "... labor organizations . . . when engaged in their primary function of advancing employee welfare, are institutions unto themselves within the framework of this country's economic scheme . . ."³¹ And one sentence later, the Board made reference to "... the singular characteristics of their institutional operations."³²

Because of their "singular characteristics," because of the inherent equity in dealing with union employers equally with business employers, because of their specific statutory mention,³³ it was arbitrary and capricious for the Board to place unions in a jurisdictional category with the Lutheran Church and Columbia University,³⁴ and it was error for the Court of Appeals

³¹ J. A. 1791.

³² J. A. 1791.

³³ Judge Bazelon's dissenting opinion below said: "I think Sec. 2 (2)'s strikingly particular reference to labor unions sharply differentiates them from non-profit organizations generally and subjects them to the jurisdiction of the Act in respect to their own employees."

³⁴ *Lutheran Church, Missouri Synod*, 109 NLRB 659; *The Trustees of Columbia University*, 97 NLRB 424.

to approve this odd rationalization for an unwholesome result.

III. Conflict Among the Decision Makers: There Is No Majority Reasoning to Support This Paradoxical and Unwarranted Result

While admittedly there is no conflict among decisions of appellate courts on the issues here, since but one Court of Appeals has passed on the Board's ruling, Petitioner does want to point out there is no majority reasoning to support the result in this case.

Nine adjudicators have ruled thus far. The Trial Examiner held that jurisdiction ought to be asserted, based on the Board's prior ruling in *Air Line Pilots Association, supra*, and the language of Sec. 2 (2). Two dissenting members of the NLRB said that Sec. 2 (2) and its legislative history indicated a Congressional purpose to hold unions when acting as employers liable for unfair labor practices. Judge Bazelon, dissenting below, became the fourth adjudicator to agree that NLRB jurisdiction must be taken over unions when acting as employers.

Four decision-makers stand opposed in reasoning. The two controlling members of the NLRB, Chairman Farmer and Member Peterson, held that the Board was free to exercise its discretion to refuse jurisdiction. The two majority judges of the Court of Appeals agreed, approving substantially the reasoning of the two Board members.

The ninth adjudicator, Member Murdock of the Board, rested his decision on entirely different grounds, reading the legislative history as indicating that Congress meant to cover unions as employers only when these unions were engaged in commercial business.

Since the Board completely disregarded this view in the Court of Appeals by neither briefing nor arguing Member Murdock's aberrant position, and since the legislative history wholly fails to support Mr. Murdock, his reasoning ought not to merit further consideration.

An issue of basic public importance, decided in such a way as to bring into question the fundamental fairness of our labor relations law, should not be allowed to stand with no majority reasoning to support it. Only this Court can provide a final reasoning with sufficient authority to merit the confidence of our people.

CONCLUSION

For reasons heretofore presented, this petition for certiorari should be granted.

Respectfully submitted,

JOSEPH E. FINLEY

215 DeSales Building

Washington, D. C.

Attorney for Petitioner

LIPPMAN, WOODS, TYLER AND FINLEY

215 DeSales Building

Washington, D. C.

Of Counsel.